COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Samuel O. Olabosipo
[redacted]

Electronics Boutique
Arlington, Virginia

Date of Appeal to Commission: July 22, 1993

Date of Hearing: September 21, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 43043-C

Date of Mailing: October 4, 1993

Final Date to File Appeal with Circuit Court: October 24, 1993

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9308876), mailed July 21, 1993.

APPEARANCES

Two Employer Representatives

ISSUES

Did the parties receive a fair, impartial hearing as mandated by the provisions of Section 60.2-620(A) of the Code of Virginia (1950), as amended?

Was the claimant discharged for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from a decision of the Appeals Examiner which disqualified him from receiving benefits, effective April 4, 1993. The basis for that disqualification was

the Appeals Examiner's conclusion that the claimant had been discharged for misconduct connected with his work.

The claimant last worked for Electronics Boutique, Inc., as an area manager from April 10, 1990, to April 2, 1993. In addition to managing one store, the claimant supervised two of the employer's other stores. At the time of separation, the claimant was earning $31,000 per year.

In February of 1993, based on a random audit of its work records, the employer discovered a problem with employment reference checks conducted by the claimant. The employer noticed that the claimant had sent in new hire paperwork for three employees and on the same day sent in termination paperwork for two of the three. The particular store for which the claimant had hired these particular employees had a high turnover rate and it was not unusual for employees to quit after a day or two on the job. However, based on the above average and excellent employment references they had received, the employer thought it was strange that the two new employees would be terminated on the same day they started work.

The employer contacted the persons whom the claimant reported had given him the specific references. In some instances, the persons whom the claimant indicated he spoke with no longer worked for or had never worked for the particular employer. In other instances, the individuals denied ever being contacted by the claimant. The employer also attempted to verify the reference checks based on its long distance telephone bills and the claimant's expense reports. The employer's telephone bills did not reflect any long distance calls made to the numbers the claimant indicated he had called. Also, the claimant's expense reports did not reflect any request for reimbursement for long distance calls made during the time in question.

The employer has written policies and procedures which provide that falsifying paperwork, including employment applications, time records or work records is grounds for immediate dismissal. The claimant was aware of these policies. He had access to the employer's policies and procedures manual located in his store and signed for a copy of the employee handbook on April 10, 1990. Also, the employer's Associates Integrity/Personal Conduct rules provided that the company would dismiss employees who willfully manipulated or falsified company records or intentionally provided false information to a superior or fellow employee to the detriment of the company.

Because he only retained his personal telephone bills for one month, the claimant did not produce documentation that he had made the calls from his home phone. Furthermore, the claimant would not usually request reimbursement from the company when he felt the amount was minimal.

In a letter to the Commission, the claimant complained about the Appeals Examiner's conduct during the hearing. The Commission interpreted that letter as a contention by the claimant that he did not receive a fair hearing as required by law.

The claimant did not personally appear to present oral argument at the Commission hearing. He did submit a written argument prior to the hearing, and that written argument has been duly considered.

OPINION

Section 60.2-620(A) of the Code of Virginia provides, in pertinent part, as follows:

> Appeals filed under Section 60.2-619 shall be heard by an appeals tribunal appointed pursuant to Section 60.2-621. Such appeal tribunal, after affording the claimant and any other parties a reasonable opportunity for a fair hearing, shall have jurisdiction to consider all issues with respect to the claim since the initial filing thereof.

In the case of King v. Southeastern Public Service Authority of Virginia, Commission Decision 31196-C (January 30, 1989), the employer argued that, for various reasons, it had not been afforded a reasonable opportunity for a fair hearing. In rejecting that argument, the Commission provided the following analysis which illustrates the principles applicable in cases such as these:

> The hearing that was conducted was a fair hearing. All of the parties had the opportunity to appear before an impartial fact finder, to confront all witnesses, to review all documentary evidence, to cross-examine all witnesses who testified, and to orally argue the case to the Appeals Examiner. Both parties were afforded a meaningful opportunity to present all of the evidence they brought with them to the hearing concerning the issue that the Appeals Examiner had to decide. The Commission does not mean to suggest that the Appeals Examiner's hearing was perfect. No hearing is perfect. Fortunately, due process requires only that the parties be afforded a reasonably fair opportunity to have their case heard in a meaningful manner. That opportunity was afforded to both parties.

It is clear from the record that the claimant was given a reasonable opportunity to present all of his evidence, to cross-examine the employer, and to orally argue his case. During cross-examination, the claimant had a tendency to testify, particularly

if he disagreed with what the witness said. The Appeals Examiner repeatedly instructed him not to do so and informed him that he would be given an opportunity to present his evidence on direct examination. Furthermore, despite several explanations by the Appeals Examiner concerning the hearing procedures and the order of proof, the claimant asked on a number of occasions if he would have the opportunity to testify. He perceived that the Appeals Examiner became irritated with him based on her tone of voice and demeanor; however, the claimant's contention that the Appeals Examiner's behavior prevented him from having a fair hearing is without merit.

In the case of Luther v. Dynamic Engineering, Inc., Commission Decision 40782-C (March 1, 1993), the Commission held:

> The due process requirement of impartiality would not be met if the Appeals Examiner's conduct (1) demonstrated manifest bias or prejudice towards the parties; or (2) barred or made it unreasonably difficult for a party to present relevant, material evidence; or (3) was so egregious and outrageous as would shock the conscience of reasonable people. Undue abruptness, discourtesy, or occasional intemperate remarks would not necessarily show a lack of impartiality on the part of the presiding Appeals Examiner.

It is evident from the record that the Appeals Examiner, became frustrated when the claimant persisted, despite frequent admonitions, in trying to testify during cross-examination. That frustration could have been perceived as rudeness or undue abruptness. Although the Commission does not condone rudeness or discourtesy by any of its employees, the Appeals Examiner's conduct was not of such a nature that denied the claimant a fair and impartial hearing.

Section 60.2-618(2) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the Court held:

> In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and

> obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

The disqualification for misconduct is a serious matter which warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with work. Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

The employer had a written policy which provided for the immediate dismissal of employees who falsified paperwork, which included employment applications. Since all employees owe their employers a duty of honesty, such a rule is manifestly reasonable. The claimant was aware of this policy as evidenced by his signing for a copy of the employee handbook.

The claimant represented to the employer that he made certain reference checks for new hires; however, an internal investigation by the employer revealed that claimant had not made the reference checks as he asserted. Furthermore, the employer's long distance telephone bills did not reflect the telephone numbers which the claimant alleged he called to obtain the references. The claimant did not present any documentation to show that he made the calls from his home telephone, and his expense reports did not reflect that he had requested reimbursement for the long distance telephone calls in question.

Based on this evidence, the employer has proven that the claimant falsified the employment paperwork for the new employees. Such an act violated the employer's rules, and constituted misconduct connected with work. See generally, Powell v. Sims Wholesale Company, Commission Decision 13448-C (June 10, 1980); Madison v. Newport News Shipbuilding and Dry Dock Company, Decision UI-78-7966 (December 26, 1978), aff'd, Commission Decision 12128-C (May 24, 1979), aff'd, Circuit Court of the City of Newport News (June 9, 1980); Cobble v. United Consumers, Inc., Commission Decision 41966-C (June 28, 1993).

The claimant asserted as mitigation that he made some of the calls from his home. Although he may have thrown away his copy of his home phone bill, the claimant could have obtained a duplicate from the phone company. Further, his assertion that he made some of the calls from a pay phone is simply not credible in light of the complete evidentiary record. Therefore, the claimant did not prove mitigating circumstances and he must be disqualified from receiving benefits as provided by the statute.

DECISION

The Appeals Examiner's decision is hereby affirmed. The claimant is disqualified from receiving benefits, effective April 4, 1993, because he was discharged for misconduct connected with his work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during 30 days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

M. Coleman Walsh, Jr.
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)